IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1572

THE STATE OF ARIZONA, Petitioner,

vs.

JANICE WHITTINGHAM and
GREG WHITTINGHAM, Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF ARIZONA DIVISION ONE, DEPARTMENT A

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TO: The Honorable Chief Justice and Associate Justices of the United States Supreme Court.

This Brief in Opposition omits any reference to: Opinion Below, Jurisdiction, Questions Presented and Constitutional Provisions and Statutes Involved. It contains a Statement of the Case, Argument and Conclusion.

STATEMENT OF THE CASE

Respondents believe that the statement of facts made by the trial judge in his memorandum opinion (Appendix 3a and 4a) is a good and succinct statement of the facts which really matter:

> "On October 18, 1969 a group of over forty people, some of whom appeared to be Indians and other non-Indians, gathered together in a building on the property of one Andrew Scott situated in the Town of Parks, Coconino County, Arizona in an area not within the boundaries of an Indian Reservation. The purpose of the meeting was to perform a religious ceremony to bless the marriages of the defendants Janice Whittingham and Greg Whittingham and another couple. The couples had been previously married in civil proceedings in the State of California. Although neither Mr. or Mrs. Whittingham appeared to be of Indian descent, Mrs. Whittingham testified, without rebuttal, that her grandfather was a full-blooded Blackfoot Indian.
>
> During the ceremony at Parks, police officers arrested those present, including the Defendants Whittingham, who were subsequently charged with having violated Section 13-1061, Arizona Revised Statutes, which prohibits the possession of peyote."

ARGUMENT

What Petitioner seeks to do is to have this Court examine a substance (peyote), not a principle (religious freedom).

Petitioner really asks this Court to review the very extensive record of this case and thereupon conclude (contrary to the Arizona Court of Appeals) that peyote is so potentially harmful to human beings that the State may prohibit its possession for any purpose whatsoever.

In order to reach its goal, Petitioner will ask this Court to accept narrowly the selected testimony of its key witness, Maurice Seevers. In the trial of the action this witness stated his beliefs (based on unpublished animal studies made 16 years earlier). The Arizona Court of Appeals reviewed this testimony and concluded the following about Seevers' testimony:

> "In essence, the testimony does substantiate the State's contention that

the excessive [emphasis added] use of peyote might be [emphasis added] attended by certain ill effects or damage to humans. However, we take judicial notice of the fact that many products are marketed universally and yet if ingested in unusually large amounts can be harmful, to wit, aspirin and alchohol."

The Court went on:

"Furthermore, the State failed to prove that the quantities of peyote used in the sacraments of the Native American Church are sufficiently harmful to the health and welfare of the participants so as ' . permit a legitimate intrusion under the State's police power." Page 22a of Petitioner's Appendix.

This conclusion of the Court of Appeals is amply supported by Mr. Seevers' own testimony, lines 6-24, p. 898, T.R., Vol. VI:

"Q Do you agree with the following statement, Doctor: From what we can find out in our studies peyote is not nearly as bad as sleeping pills or drugs of that type?

A I agree. I think I made the statement.

Q Yes. I think you did, too, before the Navajo Council.

A Right.

Q Continuing: 'And yet the United States Government has not seen fit to declare alcohol illegal. And from our studies and what we can find out both alcohol and sleeping pills have a much worse effect on the individual than peyote.'

A They do.

Q Do you agree with that statement today?

A I agree with the fact that they are more dangerous than peyote."

From the foregoing it is clear that peyote is a substance less dangerous than alcohol. The example of alcohol is helpful in drawing an analogy. The potential for abuse of alcohol is well known: excessive consumption has many ill effects and causes many social problems. For this reason, states have regulated its uses, governing the places where it may be sold, the hours of sale, and the age of those who may consume it. From 1919 to 1933, its possession was banned by Federal Prohibition. But in a religious setting, ingestion of alcohol occurs on unlicensed premises,

at irregular hours (it cannot be sold on Sunday mornings in Arizona, for instance), and it may be imbibed by minors. These things would all occur where wine was taken as a sacrament during the communion ceremony. This religious use of alcohol was also exempted from the 1919-1933 Federal Prohibition.

As mentioned in Petitioner's petition, peyote is considered to be in a special category in the federal regulations. Various authorities seem to acknowledge the harmlessness of peyote properly used.

The trial court found that:

> "It is true that the use of peyote in bona fide religious ceremonies of the Native American Church is exempted under Federal Food and Drug Regulations. Also the Bureau of Indian Affairs has legalized peyote for religious use on certain Indian Reservations, including the Navajo Reservation. Further, certain states have, by statute legalized peyote for religious use." Appendix 9a.

Respondent adds to this the fact that other states

have found a similar exemption through case law, as California in People v. Woody, 61 Cal.2d 716, 40 Cal. Rptr. 69, 394 P.2d 813 (1964), and now Arizona in the instant case.

The outcome of the case at bar is that Arizona's law is now consistent with all of the above examples. The statutory law - making it a misdemeanor to possess peyote - has had an exception applied to it by case law.

The exception is that a person may possess peyote if he shows that it is used:

> ". . . in connection with a bona fide practice of a religious belief; that it was an integral part of the religious exercise; and that it was used in a manner not dangerous to the public health, safety or morals." Appendix 25a.

By this ruling, there exist sufficient safeguards in both directions: the sincere participant in a safe religious practice where peyote is an integral part of the religion may practice his belief; on the other hand, the state is protected against free use of

the substance by those who are on a lark of their own.

Other cases cited by the Petitioner deal with bogus religions, different substances, or are otherwise different. None deals with use of peyote in a bona fide ritual of the Native American Church. No other case deals with an established, recognized religion of long standing where the practice is an essential element. In the 100 years since Reynolds v. United States, 98 U.S. 145, 25 L.Ed. 244 (1878), for instance, the Mormon Church has demonstrated that it can successfully function without polygamy, but the Native American Church cannot exist without peyote.

As the Court of Appeals pointed out:

> ". . . the use of peyote during a 'meeting' is a central force and the theological basis of Peyotism. Peyote constitutes, in and of itself, an object of worship. Without it the sacraments of the Native American Church are obliterated. Therefore, it seems apparent from the record that believers who worship at the Native American Church cannot freely exercise their religious beliefs absent the use of peyote." Appendix 19a.

In summary, peyote is a relatively harmless substance which is used in a safe manner in the rituals of the Native American Church and is essential to the religion. The Arizona Court of Appeals acted properly in allowing possession of peyote for such religious use.

Petitioner also raises secondary issues, such as whether there was a bona fide religious ceremony and whether Respondents were sincere participants. Obviously this is a question of fact and not a proper matter to engage this court's attention through certiorari.

The trial court, after seven and one-half days of trial concluded as to these issues:

> "The purpose of the meeting was to perform a religious ceremony to bless the marriages of the defendants Janice Whittingham and Greg Whittingham and another couple." Appendix 3a.
>
> ". . . the ceremony . . . substantially followed the recognized form of a service of the Native American Church

and was conducted and presided over by a Road Crew and Road Chief who had traveled from the Navajo Indian Reservation for that purpose." Appendix 7a.

". . . the Court finds that the Defendants Whittingham were serious and sincere participants in what they considered to be a ceremony having religious significance, which was conducted for the purpose of blessing their marriage." Appendix 7a.

On the same point, the Court of Appeals stated:

". . . the record before this Court does not give us pause to doubt the appellants' [Whittinghams'] sincerity." Appendix 24a.

Also the Court of Appeals said:

". . . we feel. . . that the defendants were sincere participants in what appeared to be a meeting of the Native American Church." Appendix 25a.

Petitioner also suggests that the Native American Church is open only to Indians. As to this issue, the trial court found:

". . . membership to persons who are not members of Indian Tribes or do not have Indian heritage, is usually not refused." Appendix 5a.

In its concluding paragraph, Petitioner asks this Court to grant certiorari, suggesting that the Court will be able to end confusion concerning freedom of religious practice. Respondent believes that the present law is sufficient: namely, that religious practices may not be curtailed unless they are sufficiently harmful to society as to justify police power intervention. Beyond this point, one can only examine the particular practice involved to determine its harmfulness or potential for harm. There really is no escaping a case-by-case approach.

The Court of Appeals took into account peyote's potential for abuse by holding it may be possessed for religious use if "used in a manner not dangerous to the public health, safety or morals." Appendix 25a. Clearly the State should not be allowed to intervene where there is no danger, but could restrict the religious practice only where peyote was being used in a manner which was dangerous to public health,

safety or morals.

The principle is soundly established and would not be changed by a review of this case. The task of the Court would reduce itself to examining the record to see whether the use of peyote in the said religious ritual does or does not occur in a manner which is dangerous to the public health, safety or morals. In other words, the Court is being asked to decide a question of fact, not of law.

CONCLUSION

Peyote is a unique substance uniquely used in a unique religion. This case would be a poor vehicle for the establishment of broader principles.

Therefore, certiorari should be denied.

RESPECTFULLY SUBMITTED this 14 day of May, 1974.

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